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Via Email

Jessica Melkun
Division of Water Resource Management – Director’s Office
Florida Department of Environmental Protection
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Tallahassee, Florida 32399-2400
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RE: Notice of Rule Development for Chapter 62-331

Dear Ms. Melkun:

The Ecological Restoration Business Association (ERBA) is pleased to provide comments to the Florida Department of Environmental Protection (DEP) regarding DEP’s proposal to implement the Clean Water Act (CWA) 404 Program at the state level.

Background

Established in 1998 as the National Mitigation Banking Association, ERBA supports federal legislation and regulatory policies that encourage advance compensatory mitigation and private investment in ecological restoration projects that offset unavoidable adverse impacts of development, as required under the CWA. Many of our member companies are based in Florida and sponsor restoration projects throughout the state. While ERBA is focused foremost on federal-level policy, we track regional issues that could have a national impact and strive to serve as a resource to state agency partners when valuable. As Florida prepares to assume the CWA 404 Program, we offer this letter from our perspective as national practitioners with over two decades of experience in providing robust ecological solutions and navigating permitting challenges.

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General Concerns

First, ERBA supports regulatory streamlining and recognizes the unique position of states to best understand how to oversee and administer certain permitting programs that impact regulated entities within their borders. However, considering the long history of administration in Florida of the 404 program by the U.S. Army Corps of Engineers (USACE) up until this point, there are many lessons for DEP to learn from the USACE Districts' implementation of the 2008 Compensatory Mitigation Rule, including some existing best practices and opportunities for improvement. Indeed, failing to give due weight to the depth of experience and current practices of the USACE District may actually hinder the overall streamlining effort behind state program assumption.

To that end, ERBA has organized these comments to provide thoughts from the national perspective and then two sets of more specific recommendations: first, existing requirements for assumption of the 404 program and second, procedural elements of assumption for DEP to consider. Ultimately, ERBA's goal, regardless of the USACE District or state, is for robust ecological projects, whether a bank, ILF program, or PRM, that are held to consistent, equivalent, and transparent standards.

I. Overall Considerations on Fulfilling the Intent of Assumption

Again, ERBA finds Florida's goal of permit streamlining laudable and a goal that we share, as our business role generally revolves around expediting permits for development. However, from our experience nationally, we are concerned that Florida DEP's proposed assumption of the 404 program with the current level of DEP resources could lead to a significant decrease in the state's industry growth. A vibrant mitigation banking program is usually found in all fast-growing parts of the country, simply because the availability of mitigation credits facilitates development approval under the Clean Water Act.

Compared to other USACE District offices, the Jacksonville USACE District office has a higher number of knowledgeable staff devoted to and equipped with the bandwidth and resources to timely and expertly process mitigation project applications and permits. This is a

level of institutional expertise that will take some time for DEP to build and acquire. Further, from an administrative perspective, DEP will need to prioritize more funding towards resources and training of staff to seamlessly assume the program and respond to permits on par or more efficiently than the Jacksonville District office. Anecdotally, our members have found that just the rule-making process alone has drastically slowed the ability of agency officials to move projects forward in an expedient manner.

Considering the other two states, New Jersey and Michigan, that have already assumed the 404 program, our member companies report that unfortunately for mitigation customers in those states, the mitigation banking markets are small to non-existent. This is primarily due to a limited banking program administered by the state because these states simply lack the dedicated resources to provide a level of equivalency with the federal program. If trying to expedite development approvals, having mitigation options, including mitigation banks, has been a proven and often preferred solution for Florida's development. With the current level of funding, state assumption of the program may not be the best means to the end goal.

Finally, in light of these concerns and those outlined below, ERBA suggests DEP consider simplifying the rulemaking by carving out administration of the mitigation banking, ILF and PRM mechanisms and leaving such administration with the USACE for now. The state's assumption of other 404 program aspects would still alleviate some administrative burdens from the USACE, and thus still expedite permitting by freeing the USACE to prioritize their own efficiencies in implementation of the 404 program.

II. Elements of the Federal 404 Program that are critical to success under a State 404 Program

Florida is operating its mitigation banking programs under rules promulgated before the 2008 Compensatory Mitigation Rule was adopted into the 404(b)(1) Guidelines, and Florida rules are less stringent and less protective than the federal standards. Further, Florida's rules governing permittee-responsible mitigation are also less protective than the federal standards. Since a requirement of federal assumption is that the standards be as protective as federal standards, and to avoid increasing complexity, we believe Florida should adopt the 404(b)(1)

Guidelines by reference so that there will be no doubt about the applicable standards. Some of the key elements of the Compensatory Mitigation Rule that need to be adopted are listed below:

- Required elements of any compensatory mitigation (i.e. the 12 elements of any mitigation)
- Required elements of a mitigation bank and ILF prospectus
- Clarification on the permissible use of uplands and upland buffers as mitigation, as well as the use of preservation for mitigation
- Timelines for the IRT, prospectus application, and MBI
- Monitoring requirements and sufficient long term endowment requirements

III. Procedural Issues in Administration of the 404 Program

While Florida's assumption of other federal environmental programs has been successful, these other program assumptions have been accomplished by strict conformance to federal standards – adopting and revising standards in lockstep with the federal agencies -- and with complete delegated authority. Complete delegation, however, is not allowed under § 404(g), which withholds the waters described in the parenthetical, and thus while still alleviating some administrative burdens from the resource-strapped USACE district offices, State 404 Assumption may create procedural complexities in the process of dividing assumable from non-assumable waters, in the five-year permit limitation, and in the federal oversight processes. Our members are concerned that since most streams in Florida have a navigable ocean outlet, the service area of mitigation banks will include both retained and assumed waters. We believe that more procedural definition is needed about how existing and future mitigation banks will need to be structured to serve our clients as efficiently as we currently do.

Resolving this procedural definition issue is also critical to preventing greater uncertainty and duplicative permitting efforts for our members and their clients. Under Florida's current proposal, which waters will be assumed versus retained is unclear and could

result in bankers needing multiple permits in addition to those already required for a single bank site. Such a result would mean greater inefficiencies and delays for regulated entities that would have to seek likely duplicative permits from different agencies. Along with this duplicative and additional permitting risk, our members are also concerned about the procedural logistics of tracking credits and debits, an instrumental component of mitigation bank oversight, and the open question of which central agency would be tasked with tracking such credits for a bank covering multiple jurisdictional water classes. Prior to 404 assumption, we recommend DEP further consult with practitioners and the Corps on establishing a clear plan to handle these important procedural elements of mitigation banking.

Closing

Only with careful planning by DEP will both mitigation providers and the regulated community actually realize the benefits of streamlining under state implementation of the program. To continue to incentivize private sector investment in uplifting and restoring the state's prized ecosystems, the state must respect the complexities of the industry and the years of history behind successful and accountable restoration projects.

Thank you for your consideration of ERBA's comments. We are happy to provide any additional information upon request.

- Ecological Restoration Business Association